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In the

Supreme Court of the United States

DAVID MEYER,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE National Association of REALTORS® IN SUPPORT OF PETITIONER

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NATIONAL ASSOCIATION OF REALTORS®:

Article 10, Code of Ethics 2

BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITIONER DAVID MEYER

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the National Association of REALTORS® ("NAR"), submits this brief in support of the Petitioner, DAVID MEYER.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NAR is a nationwide, non-profit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. As such, NAR is a champion of the interests of real estate professionals and real property owners throughout the United States.

Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities, including promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 State Associations of REALTORS®, approximately 1,600 Local Associations of

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[1] The parties have consented to the filing of this brief and the letters of consent are filed with the Clerk of the U.S. Supreme Court herewith. Pursuant to Rule 37.6, *amicus curiae* states that counsel for a party did not author this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

REALTORS®, and approximately 795,000 "REALTOR®[2]" and REALTOR-ASSOCIATE® members. Petitioner David Meyer has retired from active real estate practice, but was, at the time of the events at issue in this case, a member of NAR.

INTRODUCTION

NAR has a substantial and long-standing commitment to equal opportunity in housing and fair housing compliance. Pursuant to this commitment and immediately upon the adoption of the Fair Housing Act, 42 U.S.C. §§ 3601-3619, NAR adopted Article 10 of its Code of Ethics which mandated that:

> *The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex or country of national origin.*[3]

In 1975, NAR and the U.S. Department of Housing and Urban Development ("HUD") created and adopted a Voluntary Affirmative Marketing Agreement ("VAMA"). The VAMA was the first nationwide program to implement § 809 of the Fair Housing Act, which calls for the Secretary of HUD to "work out programs of voluntary compliance and of enforcement" with persons in the housing industry. 42 U.S.C. § 3609. Renewed in 1981, 1987 and 1992, the VAMA served as the model for agreements subsequently adopted by other segments of the real estate market, including the National Association of Homebuilders, the National Association of

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[2] "REALTOR®" is a federally registered collective membership mark used by members of NAR to indicate their membership status.

[3] Article 10 was amended to add the protected classes of handicap and familial status in 1988.

Real Estate License Law Officials and the American Institute of Real Estate Appraisers. The VAMA was replaced in 1996 with the NAR/HUD Fair Housing Partnership Agreement, which remains in effect today. This Agreement lays out a comprehensive program for NAR and HUD, as partners, to implement their commitment to fair housing.

NAR's concern about the opinion of the Ninth Circuit derives directly from its commitment to Fair Housing Act compliance. The opinion below is of far reaching importance to NAR's many members, as well as hundreds of thousands of incorporated real estate brokerage firms, because it abandons a fundamental tenet of corporate law relied on by many real estate firms. NAR is deeply troubled by the way in which the Ninth Circuit's opinion inappropriately and unnecessarily imposes *personal* liability on owners and officers of real estate brokerage corporations, *solely* as a result of those positions, for discriminatory conduct by the sales agents of such corporations. This conclusion is unprecedented, unsupported by the Fair Housing Act or any other authority, including that cited by the Ninth Circuit, and squarely at odds with existing principles of corporate law and fairness. Any imposition of personal liability should be in accordance with a fault-based standard.

NAR urges this Court to reverse the Ninth Circuit and establish the principle that corporate owners and officers are not, as a consequence of holding those positions alone, strictly liable for the Fair Housing Act violations of corporate agents, but instead may be liable only when they participate in or otherwise are directly responsible for the conduct that constitutes the violation.[4]

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[4] NAR emphasizes that its interest and concern is solely with respect to the Ninth Circuit's holding that Petitioner Meyer is liable for the Fair Housing Act violations of an agent of Triad Realty because he is Triad's shareholder and president. All references in this *amicus* brief

(continued...)

SUMMARY OF ARGUMENT

This case presents the question "whether . . . owners and officers of (real estate brokerage) corporations are absolutely liable for an employee's or agent's violation of the (Fair Housing) Act, whether or not they personally directed, authorized, or were even aware of the particular acts that occurred." *Petition for Certiorari at i.* This case does *not* raise the issue of whether individuals acting in their capacity as real estate brokers are liable for the Fair Housing Act violations of their agents.

The question for this Court, and that which invokes NAR's concern, is whether Petitioner, as an innocent owner and officer of Triad, is liable under the Fair Housing Act for Crank's misconduct. The Ninth Circuit's holding that Meyer may be liable on the basis of his status as owner and president of Triad Realty, without fault or culpability, is incorrect, and requires reversal by this Court.

First, the starting point for the question presented is, of course, the Act itself. Straightforward examination of the text of the Act, the relevant regulations and the Act's legislative history, reveals that the Act provides no basis whatsoever for holding owners or officers personally liable for discriminatory conduct by agents of such firms.

Second, the principle of "non-delegability" cannot be applied to hold owners or officers personally liable for violations of the Act by their corporation's agents. The Ninth

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(...continued)
to Meyer's liability, or that of owners or officers of real estate corporations generally, should be understood to refer only to liability arising from an individual's position as owner or officer of the corporation and without reference to any personal involvement in allegedly discriminatory conduct. Correspondingly, all references to the holding and conclusions of the Ninth Circuit below refer exclusively to that court's decision as it relates to this issue.

Circuit erred in doing so. Courts have not cited or applied the concept of non-delegability in Fair Housing Act cases in a consistent fashion, with some treating it as little more than another name for the familiar doctrine of respondeat superior, while others correctly apply it as an exception to respondeat superior that disregards whether the agent was acting within the scope of his employment. In either case, however, the non-delegability doctrine applies only to hold a person acting in the capacity of a principal liable for actions of his agent. Accordingly, non-delegability may cause the *corporation* that is the employer of a real estate sales agent to be liable for the agent's violations of the Act. However, non-delegability is simply inapplicable to the owners and officers of the corporation, since they are not principals of the corporation's agents.

Third, traditional corporate law does not dictate a conclusion that owners or officers are personally and strictly liable for the acts of corporate agents. Contrary to the Ninth Circuit's suggestion, there is no basis to apply a different rule in the context of the Fair Housing Act. Courts do not hold corporate owners and officers personally liable for the unlawful conduct of corporate agents with respect to other matters of significant public concern, unless there has been personal involvement. Moreover, existing theories of law afford victims with recourse when corporate agents act wrongfully and corporate owners and officers are truly culpable.

Finally, since neither the Fair Housing Act, the common law, nor the principle of non-delegability provide a basis for owners and officers of incorporated real estate brokerages to be held personally liable for violations of the Act by firm agents, any Fair Housing Act liability of those owners and officers must be based on personal fault. Liability is appropriate where the individuals participated in the alleged discriminatory conduct, or where they bore responsibility or were otherwise culpable for the conduct which allegedly violated the Act.

ARGUMENT

I. Neither the Text of the Fair Housing Act, Its Legislative History, Nor the Regulations Promulgated Pursuant to the Act Provide That an Innocent Owner or Officer of an Incorporated Real Estate Firm Is Strictly Liable for the Fair Housing Violations of the Firm's Agents.

The proper place to begin any inquiry as to whether owners or officers of an incorporated real estate brokerage firm bear personal and strict liability under the Fair Housing Act ("Act") for violations of the Act by employees or agents of the firm is, of course, the language of the Act itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Examination of the text of the Act yields nothing to suggest that owners and officers may be held personally liable. The Act prescribes the discriminatory conduct made unlawful under the Act, but does not explicitly identify those who may be liable for violations of the Act. 42 U.S.C. §§ 3604-06. "Respondent" is defined to mean only

> *(1) the person or other entity accused in a complaint of an unfair housing practice; and (2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under § 3610(a) of this title.*

42 U.S.C. § 3602.

In short, the Act proscribes conduct without expressly, or even implicitly, suggesting that liability is to be strictly imposed on corporate owners or officers when a corporate employee or agent engages in conduct that violates the Act.[5]

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[5] The Act is silent even as to any fault-based liability of corporate owners or officers, in sharp contrast to the clear intent of Congress with respect to antitrust violations:

(continued...)

The Act's legislative history is equally silent on the issue. Although both chambers of Congress engaged in extensive and active debate preceding enactment, nothing said by any Member of Congress, nor any portion of the House and Senate reports, suggests any Congressional intent that owners and officers of corporate real estate firms be held liable for violations of the Act, in that capacity alone and without more.[6]

The regulations promulgated by the Department of Housing and Urban Development ("HUD") in connection with enforcement of the Act, 24 C.F.R. §§ 100-103 (2002), likewise do not impose liability for violations of the Act by corporate employees on the shareholders or officers of the corporation. To be sure, the prior version of 24 C.F.R. §103.20(b) (1999), on which the Ninth Circuit relied, in part, did address "Persons

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(...continued)

> Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, . . .

15 U.S.C. § 24. *See also Circle T Corp. v. Deerfield*, 444 P.2d 404, 407 (Colo. 1968), where the statute expressly provided that a person injured by a corporation's breach of fiduciary duty could bring a claim for relief against the corporation and "the designated member or director acting as broker." C.R.S. 1963, 117-1-5(8).

[6] Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81; 113 CONG. REC. H22818-819 (daily ed. Aug. 16, 1967); 114 CONG. REC. H9551-613 (daily ed. Apr. 10, 1968); 114 CONG. REC. S5995-6002 (daily ed. Mar. 11, 1968); Pub. L. No. 100-430, 102 Stat. 1619; 134 CONG. REC. H16475-512 (daily ed. June 29, 1988); 134 CONG. REC. H20910-920 (daily ed. Aug. 8, 1988); 134 CONG. REC. S19870-907 (daily ed. Aug. 2, 1988).

against whom complaints may be filed."[7] For several reasons, however, the Ninth Circuit's reliance on that regulation was erroneous, and this Court should reject any suggestion that the regulation indicates the intent of Congress or HUD that corporate owners and officers be personally liable for violations of the Act by corporate employees or agents.

First, the text of that regulation does not support liability for corporate owners and officers. The Ninth Circuit emphasized the language that permits complaints against any person "who directs or controls, or has the right to direct or control, the conduct of another person" and concluded that David Meyer, as owner and officer, could be personally liable for the conduct of Triad Realty agent Crank. *Holley v. Crank*, 258 F.3d 1127, 1130-31 (9th Cir. 2001) *quoting* 24 C.F.R. §103.20 (1999). Although the court did not expressly state this, it presumably determined that as owner and officer, Meyer controlled, or had the right to control, Crank. But the court ignored the language following that which it quoted. That language further requires that the "other person" (that is, the individual actually engaged in discriminatory conduct) be "acting within the scope of his or her authority *as employee or agent of the directing or controlling person. . . .*" (Emphasis added.) 24 C.F.R. §103.20(b) (1999). As sales agent for Triad Realty, Crank was an employee of Triad, not of Meyer, and Triad was *"the directing or controlling person."* Thus, even if applicable, this regulation leads only to the conclusion that

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[7] 24 C.F.R. §103.20 (1999): "Persons against whom complaints may be filed. (a). . . (b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice."

Triad Realty, not Meyer, bears liability for the actions of Crank.

Moreover, examination of the history of 24 C.F.R. § 103.20 clearly demonstrates that it was not intended to be applied with the broad brush wielded by the Ninth Circuit. That history is accurately and articulately set forth in the dissenting opinion in *Walker v. Crigler*:

> *The history of the promulgation of the present §103.20 confirms that HUD in no way intended to impose strict vicarious liability upon innocent property owners. . . .*
>
> *. . . HUD's comments accompanying the publication of the final version of the rule in question, which remains the version in force today, both make clear that no strict liability was intended:*
>
> *'[I]t is not HUD's intent to impose absolute liability on any principal; the intent, in proposing paragraph (b), was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent. . . . 53 Fed. Reg. 24185 (1988)'*

976 F.2d 900, 906-07 (4th Cir. 1992) (Widener, dissenting) (footnotes omitted).

The dissent in *Walker* concludes that "the most straightforward reading of the text of the present §103.20, . . . (provides) that familiar principles of agency law, and not strict liability, control a principal's liability for the acts of an agent." *Id.*

Thus, this regulation was not intended to impose absolute liability even on real estate brokers to whom sales agents are directly responsible, let alone the owners and officers of the real estate firm who employ these brokers and agents. Instead, HUD's intent was merely to codify case law regarding the liability of a principal for acts of an agent, including the requirement that the principal (the broker) is liable only if the agent was acting within the scope of his or her authority.

Given that, it is incorrect to apply this regulation to hold that innocent owners and officers of corporate real estate firms, who are not, as noted above, principals of the agents of the firm, absolutely liable for the conduct of agents.

In short, neither the text of the Act, its legislative history, nor the regulations adopted by HUD for enforcement of the Act, including the specific regulation relied on below, support the Ninth Circuit's conclusion that "owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act . . . ." *Holley*, 258 F.3d at 1129.

II. The Non-Delegation Doctrine Does Not Require an Innocent Owner or Officer of a Real Estate Brokerage Corporation To Be Held Strictly Liable for the Fair Housing Act Violations of the Corporation's Agents.

The Ninth Circuit also concluded that Meyer was liable as sole owner and officer of Triad "because the duty not to discriminate is a non-delegable one. . . ." *Holley*, 258 F.3d at 1134. Contrary to the Ninth Circuit's holding, the non-delegation principle does not require or support the conclusion that owners and officers of real estate brokerage corporations are strictly liable for the acts of agents of the corporation.

A. The Non-Delegation Doctrine Creates an Exception to the Rule of Respondeat Superior Such That a *Principal* May Be Held Liable for the Conduct of a Corporate Agent Regardless of Whether the Conduct Was Within the Scope of the Agent's Employment.

The concept and the consequences of non-delegable duties are set forth in the Restatement (Second) of Agency § 214 (1958), which subjects a principal "to liability to others for harm caused to them by the failure of (an) agent to perform (a non-delegable) duty." Comment (a) to this section explains

that a principal "is normally not responsible for the conduct of others, except that of his agent or servant acting within the scope of their employment . . .," and then explains that when a principal has "a duty to see that due care is used in the protection of another, . . . the duty of care is non-delegable." In such event, the Restatement continues, a principal may be responsible for harm caused by conduct of his agents or servants not within the scope of employment. *Id.*

Relying on this section of the Restatement, this Court addressed the doctrines of non-delegable duties and respondeat superior, albeit not in a Fair Housing Act context, in *General Bldg. Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982). In that decision, this Court noted that "the (non-delegation) doctrine creates an exception to the common-law rule that a principal normally will not be liable for the tortious conduct of an independent contractor." *Id.* at 396.[8] This Court went on to comment that "[i]n a sense, to characterize such a duty as 'nondelegable' is merely to restate the duty. . . . The question is what duty does (the statute) impose." *Id.*[9]

Under respondeat superior, therefore, principals are liable only for acts of their agents within the scope of their employment. Where the principal has a duty deemed to be non-delegable, however, liability may be imposed on the principal even if the agent acts outside the scope of employment. In either case, the threshold question is whether the defendant is a principal of the person who committed the actions on

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[8] *See also Maguire v. Montana*, where the Montana Supreme Court also described § 214 as providing a "nondelegable duty exception to the (common law) respondeat superior doctrine." 835 P.2d 755, 759 (Mont. 1992).

[9] As explained in Section I of this *amicus* brief, the Act imposes *no* duties on owners and officers of real estate brokerage corporations in such capacities alone.

which the plaintiff's claims are based. As a matter of law, owners and officers of real estate corporations are not, as a consequence of those capacities alone, principals of the agents of the corporation. *Berry v. Stevinson Chevrolet*, 804 F.Supp. 121, 134 (D.Colo. 1992).

B. Courts Have Inconsistently Applied the Non-Delegation Doctrine in Their Analyses of Prior Fair Housing Act Cases.

The non-delegation concept in Fair Housing Act cases appears to have been first suggested in *U.S. v. Real Estate Dev. Corp.*, 347 F.Supp. 776 (N.D. Miss. 1972). In *Real Estate Dev. Corp.*, a case involving alleged racial discrimination in making rental housing available, the court attributed the actions of the resident apartment managers to the defendants who had employed them—that is, to their principals. *Id.* at 785.[10] The court noted that the managers/agents' "acts and statements, made within the scope of their agency, were attributable to the defendants, whose duty to comply with the law is 'non-delegable.' " *Id.* at 785. Thus, the court improperly addressed the "scope of agency" question in its non-delegability analysis.

Real Estate Dev. Corp. was subsequently quoted and relied on in *U.S. v. Youritan Constr. Co.*, where the court concluded that the owner and property manager of an apartment complex was liable for the discrimination of its apartment manager rental agent "both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable." 370 F.Supp. 643, 649 (N.D. Cal. 1973), *aff'd in part,*

[10] The principals were both the corporation that had owned the property and the individual owner, who had become the property owner upon dissolution of the corporation, which had taken place prior to the court's decision. 347 F. Supp. at 779.

remanded in part by 509 F.2d 623 (9th Cir. 1975). The court did not explain its understanding of the distinction between those two doctrines, but merely noted that "where, as here, management's lack of supervision and failure to establish objective and reviewable procedural standards have resulted in apartments being made unavailable to blacks by agents and employees, management's failure to act is in itself violative of § 3604(a)." *Id.*

Shortly thereafter, in *Marr v. Rife*, the Sixth Circuit reversed the District Court's conclusion that the owner of a real estate firm could not be held liable for the discrimination of the firm's agents, citing the non-delegability principle articulated in *Youritan* and *Real Estate Dev. Corp. Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974). The District Court had held that defendant Doug Rife, proprietor of the Doug Rife Realtor Agency, could not be charged with liability because there was no evidence that he had personally joined in any of his agent's discriminatory conduct, or that the agent "acted with the approval or at the direction of Rife." *Id.* at 740-42.

The Sixth Circuit reversed, asserting that "as owner of the agency, Rife had at least the power to control the acts of his salesmen." *Id.* at 742. Thus, in *Marr*, the court concluded that the duty of an owner to comply with the Fair Housing Act is non-delegable, and held the owner—the principal of the agents who engaged in the discriminatory conduct—liable, notwithstanding his lack of knowledge or involvement in the discriminatory acts. *Id.*[11]

[11] It is important to note that *Marr* is distinguishable from the facts in this case because the firm is described only as "a real estate agency," and thus not necessarily a corporation. Indeed, the opinion refers to defendant Doug Rife as "proprietor of the agency," at least suggesting that the firm was a sole proprietorship, rather than a corporation. In either event, the court in *Marr* correctly applied the

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Subsequent Fair Housing Act cases have likewise held that compliance with the Act is non-delegable, but that conclusion is inapt to the question of liability of corporate owners and officers of real estate corporations for the acts of corporate agents. These cases are not consistent in imposing liability on a principal without consideration of whether the agent acted within his scope of employment, or whether the principal engaged in his own culpable conduct. But they are *completely* consistent in applying the non-delegability doctrine to the question of whether a principal is liable for the acts of an agent, which is, of course, the fundamental purpose of the doctrine of respondeat superior and the non-delegability exception to that common law rule.

For example, in *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, the Seventh Circuit applied non-delegability to hold the defendant corporation liable for the acts of its sales agents, citing *General Bldg. Contractors* as to the application of respondeat superior and agency law: "[A] principal cannot free itself of liability by delegating to an agent the duty not to discriminate." (Citations omitted.) 982 F.2d 1086, 1096 (7th Cir. 1992), *cert. denied by Ernst v. Leadership Council for Metro. Open Communities*, 508 U.S. 972 (1993). By contrast, the court did not reference non-delegability to conclude that Erwin Ernst, the owner of the defendant corporation, was personally liable for the Fair Housing Act violations of certain sales agents of the firm. *Id.* at 1098. Instead, the court cited Ernst's conduct and functional responsibilities as sole owner, chief executive officer and "[s]ignificantly, (supervisor of) the day-to-day operations of Matchmaker and its agents." *Id.* Based on Ernst's *personal* involvement in real estate activities, with the corresponding duty of Fair Housing Act compliance because of that personal involvement, and not simply and solely based on non-delegability or his status as owner and CEO of Matchmaker Real Estate Sales Center, Inc., the court held Ernst personally liable. *Id.*

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non-delegability doctrine in that it imposed liability on the principal without regard to whether the agent was acting within or outside the scope of his agency.

Walker v. Crigler is also consistent with this formulation. 976 F.2d 900 (4th Cir. 1992). In *Walker*, the owner of rental property was held liable for discriminatory conduct by the property manager, whose duties included renting the property and who had been hired by the owner. *Id.* at 904-05. The *Walker* court applied non-delegation to hold the rental property *owner* liable for the acts of its agents, but that conclusion is inapplicable to the quite different question of whether a violation of the Fair Housing Act by agents *of the corporation* can be imputed to the corporation's owners and officers.

In *Coates v. Bechtel*, the Seventh Circuit acknowledged that under the Fair Housing Act "the courts have imputed the wrongful acts of a real estate sales or rental agent to the property *owner* he is representing regardless of whether the owner specifically authorized the agent to engage in the racial discrimination" and that "the duty of property *owner* 'to obey the laws relating to racial discrimination' is nondelegable." 811 F.2d 1045, 1051 (7th Cir. 1987) (emphasis added). Similarly, in *Alexander v. Riga*, the court "adopt(ed) the general rule applied by other federal courts that the duty of a *landlord* not to discriminate in the leasing of property may not be delegated to the *landlord's* employee." 208 F.3d 419, 433 (3rd Cir. 2000), *cert. denied by* 531 U.S. 1069 (2001) (citing *Walker*, *Marr*, *Phiffer*, and *Coates*) (emphasis added).[12] Numerous courts in other Fair Housing Act cases have cited "non-

[12] *See also Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980) (although non-delegation was cited, the court also noted a fault-based reason for holding the individual defendant personally liable for the desk clerk's discrimination where the desk clerk's actions were dictated by the hotel management's policies).

delegation" as a basis on which to do nothing more than apply vicarious liability to hold a principal liable for the acts of an agent.[13]

C. The Non-Delegation Doctrine Does Not Apply to Owners and Officers of Real Estate Brokerage Corporations Because Such Owners and Officers Are Not the Principals of the Corporate Agents Who Committed the Unlawful Acts.

When the doctrinal underpinnings of non-delegation are properly understood, it is clear that the conclusion that compliance with the Fair Housing Act is "non-delegable" has no significance to the issue presented here: whether owners and officers of an incorporated real estate brokerage firm are liable for Fair Housing Act violations by agents of the firm. Non-delegability applies only to impose liability on a principal for the conduct of his agent, and therefore can result in liability only for the principals of those agents—that is, the real estate brokerage corporations that employ the agents.

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[13] *U.S. v. Garden Homes Mgmt. Corp.*, 156 F.Supp. 2d 413 (D.N.J. 2001); *Fair Housing Congress v. Weber*, 993 F.Supp. 1286 (C.D. Cal. 1997); *Williams v. Poretsky Mgmt., Inc.* 955 F.Supp. 490 (D.Md. 1996); *Portee v. Hastava*, 853 F.Supp. 1335 (E.D.N.Y. 1994); *Zuch v. Hussey*, 394 F.Supp. 1028 (E.D. Mich. 1975); *U.S. v. Youritan Constr. Co.*, 370 F.Supp. 643 (N.D. Cal. 1973). A few federal district courts have held that corporate officers may be held personally liable for violations by corporate employees. These cases, however, are essentially uniform in failing to provide any analysis, or usually much discussion, as to why they disregard the corporation, and must be dismissed as simply misguided. *See U.S. v. Tropic Seas, Inc.*, 887 F.Supp. 1347 (D.Haw. 1995); *Saunders v. General Servs Corp.*, 659 F.Supp. 1042 (E.D. Va. 1987); *Leadership Council for Metropolitan Open Communities v. Chicago Southwest Holiday Inn Operators Oak Lawn Lodge, Inc.*, 1985 WL 3601 (N.D. Ill. 1985); *Harrison v. Otto G. Heinzeroth Mortgage Co.*, 430 F.Supp. 893 (N.D. Ohio 1977); *U.S. v. L & H Land Corp., Inc.*, 407 F.Supp. 576 (S.D.Fla 1976).

The correct approach is illustrated by the thoughtful analysis of the Northern District of Illinois in *Reed v. Michael Realty & Associates, Inc.*, where the court found that the president and secretary of a real estate brokerage corporation, George S. Michael, was not personally liable for the discriminatory acts of the corporation's apparent agent by virtue of being a corporate officer and nothing more. 1994 WL 559225, 10 (N.D. Ill. 1994). The court noted "Courts of Appeal, including our own, . . . have observed that the duty of a property owner not to discriminate is non-delegable." The court went on to recognize the wrongdoer as an agent of the corporate real estate firm employed by the property owner, rather than an agent of Michael personally. *Id.* at 6-7. The court thus refused to hold Michael liable, by virtue of his status as secretary and president alone, for the acts of the corporation's agent. *Id.* at 10. Though the court noted that the duty of Fair Housing Act compliance is non-delegable, because the alleged wrongdoer was not an agent of defendant Michael, Michael could not be personally liable, based solely on the fact that he was an officer of the corporation of which the wrongdoer was an agent.

In short, the Ninth Circuit erred in concluding that because Fair Housing Act compliance is non-delegable, personal liability may be extended to owners and officers of corporate firms when corporate agents violate the Act. Non-delegability and ordinary principles of respondeat superior address whether principals may be held liable for the misconduct of agents, and both hold that a principal may be liable for violations of the Act by an agent. But neither applies or is instructive with regard to the question before this Court, which is whether owners and officers of an incorporated real estate brokerage firm are liable for Fair Housing Act violations by the firm's agents.

III. Common Law Provides No Basis for Abandoning Traditional Principles of Corporate Law to Hold an Innocent Corporate Owner or Officer Strictly Liable for Fair Housing Act Violations of the Corporation's Agents.

The Ninth Circuit correctly recognized that "under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action . . ." *Holley*, 258 F.3d at 1129. Turning to the question of whether courts should apply different criteria when the employee's conduct violates the Fair Housing Act—that is, "whether owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act (FHA)," the Ninth Circuit answered, "We conclude that they can." *Id.*

This conclusion is wrong. As explained below, there is no merit to the claim that departure from traditional principles of corporate law is warranted by the highly important interests safeguarded by the Fair Housing Act. In cases involving other significant interests, such as equal employment opportunity, environmental protection, product liability, RICO and consumer health, which are also of critical importance, courts have not abandoned long-standing corporate principles when examining the potential liability of corporate owners and officers. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (RICO); *U.S. v. Park*, 421 U.S. 658 (1975) (Federal Food, Drug and Cosmetic Act); *Browning-Ferris Industries of Illinois v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999), *cert. denied by Ter Maat v. Browning-Ferris Indus. of Ill., Inc.*, 529 U.S. 1098 (2000) (environmental); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168 (5th Cir. 1985) (products liability); *Berry v. Stevinson Chevrolet*, 804 F.Supp. 121 (S.D.N.Y. 1993) (employment/race discrimination).

Neither is the Ninth Circuit's determination to ignore these time-honored principles of corporate law required in order to adequately protect the victims of Fair Housing Act violations.

Such victims have other remedies and opportunities to recover against truly culpable parties. First, courts can hold the corporation itself liable. *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). *See also Fletcher Cyclopedia of the Law of Private Corporations*, § 33 (Perm. ed).

Second, courts, including this Court, have used at least two other existing theories of law to hold corporate officers and owners personally liable, under appropriate circumstances, for the unlawful conduct of corporate agents: (1) the participation theory, *Saltiel v. GSI Consultants, Inc.*, 788 A.2d 268 (N.J. 2002); *Shipley v. Perlberg*, 780 A.2d 396 (Md. 2001); *Skelton v. Chem. Leaman Tank Lines, Inc.*, 1996 WL 278343 (Conn. Super. 1996), and (2) the responsible corporate officer doctrine. *Park*, 421 U.S. at 673-74; *Commissioner, Indiana Dep't of Envtl Mgmt. v. RLG, Inc.*, 755 N.E.2d 556 (Ind. 2001).

Finally, when there is evidence that the corporation is a sham and does not have the financial resources necessary to provide recourse, courts can pierce the corporate veil so that the plaintiff may recover from an owner who was at fault. *U.S. v. Bestfoods*, 524 U.S. 51, 62 (1998); *Anderson v. Abbott*, 321 U.S. 349, 356 (1944). For these reasons, this Court should reject the Ninth Circuit's suggestion that courts should abandon established corporate law principles in the context of fair housing.

A. Accepted Principles of Corporate Law Clearly Provide that Corporate Owners and Officers Are Not Personally Liable, Solely on the Basis of their Positions, for the Unlawful Acts of the Corporation's Agents.

A fundamental tenet of corporate law, recognized consistently by this Court, is that the corporate entity is separate from its owners and officers. *Kushner*, 533 U.S. at 163; *Bestfoods*, 524 U.S. at 61; *Burnet v. Clark*, 287 U.S. 410, 415 (1932).

What underlies this recognition is that

> *the principle of limited liability . . . serves the important social purpose of encouraging investment by individuals who are risk averse and therefore will not invest (or will insist on a much higher return) in an enterprise if by doing so they expose their entire wealth to the hazards of litigation.*

Browning-Ferris, 195 F.3d at 959.

In addition, judicial recognition of the corporate structure, including its limitations on individual liability, is not inconsistent with justice for the victims of corporate employee/agent misconduct because wronged plaintiffs retain a legitimate and usually adequate source for remedy—the corporation itself. *Hydrolevel*, 456 U.S. at 556; *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556, 563 (5th Cir. 1979); *U.S. v. Northside Realty Associates, Inc.*, 605 F.2d 1348, 1353-54 (5th Cir. 1979); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232 (N.D. Ohio 1983), *aff'd in part, rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985), *cert. denied by Hilltop Realty, Inc. v. City of Cleveland Heights*, 475 U.S. 1019 (1986).

Federal and state courts across the country uniformly and consistently apply the axiom that even the Ninth Circuit in *Holley* has acknowledged: corporate owners and officers are generally not personally liable for the torts committed by agents of their corporations. 258 F.3d at 1129.[14] This is true

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[14] *See also Bestfoods*, 524 U.S. 51 at 61-62; *Burnet*, 387 U.S. at 415; *Micro Chem., Inc. v. Great Plains Chem. Co., Inc.*, 194 F.3d 1250 (Fed. Cir. 1999); *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 1999); *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725 (9th Cir. 1999); *Northside*, 605 F.2d at 1353-54; *In the Matter of Jesse Jenkins*, 788 A.2d 268 (N.J. 2002); *PMC, Inc. v. Kadisha*, 78 Cal.App.4th 1368, 93 Cal. Rptr.2d 663 (2000); *City of Evanston v. Baird & Warner, Inc.*, 1989 WL 134310, 3 (N.D. Ill. 1989); *Bischofshausen, Vasbinder, & Luckie v. D.W.*

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even when the defendant is the sole shareholder of a corporation. *Cancun Adventure Tours v. Underwater Designer Co.*, 862 F.2d 1044, 1047 (4th Cir. 1988); *Dillon*, 597 F.2d at 563; *One Pacific Towers Homeowners' Association v. Hal Real Estate Investments, Inc.*, 30 P.3d 504 (Wash. App. 2001). As this Court has said, "[l]imited liability is the rule, not the exception." *Anderson*, 321 U.S. at 361-62.

Thus, courts do not automatically impose strict liability on corporate officers and owners. *E.g., Browning-Ferris*, 195 F.3d at 956 ("the officer is (not) automatically liable for the acts of the corporation; . . . there is no doctrine of 'superiors' liability,' comparable to the doctrine of respondeat superior, ..."). Rather, courts look for actual participation or involvement in the wrongful act. *Mozingo*, 752 F.2d at 173-74; *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300 (5th Cir. 1991); *Hilltop*, 629 F.Supp. at 1303-04; *RLG*, 755 N.E.2d at 561; *Bischofshausen, Vasbinder, & Luckie v. D.W. Jaquays Mining & Equip. Contractors Co.*, 700 P.2d 902, 908-09.

B. Courts Do Not Disregard Established Principles of Corporate Law in Other Contexts of Significance, and Have No Need to Do So to Protect the Important Interests of the Fair Housing Act.

This bedrock principle of corporate law is adhered to by courts in many contexts, which, like fair housing, have critical societal importance. For instance, courts have upheld this

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Jaquays Mining & Equip. Contractors Co., 700 P.2d 902, 908-09 (Ariz. Ct. App. 1985); *Crigler v. Salac*, 438 So.2d 1375, 1380 (Ala. 1983); *Hilltop*, 629 F.Supp. at 1304; *Wicks v. Milzoco Builders, Inc.*, 470 A.2d 86, 90 (Pa. 1983); *Scribner v. O'Brien, Inc.*, 363 A.2d 160, 168 (Conn. 1975); *Fletcher Cyc. Corp.*, §§ 7, 14 (Perm. ed.) ("The shareholders of a corporation, unless they personally participate, are not liable individually for torts committed by the corporation.").

principle when determining whether officers or owners of corporations responsible for environmental hazards are liable individually. *E.g., Browning-Ferris*, 195 F.3d at 956 (remanded to determine whether the defendant had actually "operated the landfill personally, rather than merely directing the business of the corporations of which he was the president"); *Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), *cert. denied by Riverside Market Ltd. Partnership v. Prescott*, 502 U.S. 1004 (1991) (CERCLA imposes liability only on persons who actually participate in the operation of the facility; thus, inactive shareholder and officer not personally liable for environmental clean-up costs); *U.S. v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 744 (8th Cir.), *cert. denied by* 484 U.S. 848 (1987) (corporate officer individually liable under CERCLA, but only because he had personally arranged for the transportation and disposal of hazardous substances for the corporation); *Shipley v. Perlberg*, 780 A.2d 396 (Md. 2001) (corporate officer not personally liable for negligent lead based paint poisoning of resident of property that was owned by corporation because officer had no involvement in decision making, maintenance, or rental aspects.) Thus, while charged with the responsibility to ensure that important environmental goals are met, courts nonetheless refuse to hold corporate officers and owners personally liable for violations of environmental laws committed by their corporations or their corporations' agents solely on the basis of their corporate positions.

Neither do courts hold corporate owners and officers strictly liable in the employment arena. *E.g., Sasso v. Cervoni*, 985 F.2d 49, 51 (2d Cir.), *cert. denied by Bourgal v. Cervoni*, 508 U.S. 973 (1993) (sole officer, director and shareholder not personally liable for the ERISA obligations of his corporation where he had not participated in wrongdoing and where corporation was not a sham); *Whidbee v. McDonald's Corp.*, 75 F.Supp.2d 183, 193 (S.D.N.Y. 1999), *aff'd in relevant part by Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62 (2d Cir.

2000) (restaurant owners not personally liable under §1981 because there was no evidence of a "causal relationship" between the owners and the alleged racial harassment of employees); *Bramesco v. Drug Computer Consultants*, 834 F.Supp. 120, 123 (S.D.N.Y. 1993) (Potential liability of the corporation under Title VII or the ADEA does not "necessarily impute vulnerability to suit on the part of its officers, directors or owners . . . at least absent separate intentional misconduct."); *Berry v. Stevinson Chevrolet*, 804 F.Supp. 121, 133-34 (D. Colo. 1992) (corporation's owner and manager not personally liable for race discrimination because he had not participated in discrimination; employees who had engaged in unlawful discrimination were agents of the corporation rather than agents of the owner/manager); *Lawlor v. District of Columbia*, 758 A.2d 964, 975-78 (Ct.App. DC 2000) (Father and daughter shareholders/officers personally liable under the Wage Payment Law because of the level of their involvement in wrongful act, while wife/mother, who was corporate secretary, not personally liable because she had not meaningfully participated in the unlawful conduct).

Although these decisions are based on employment law statutes that differ from one another as to their definitions of an "employer", whether an individual is within the definition under a specific statute and may thus be held liable depends on the individual's specific conduct and fault. This includes considerations such as whether the corporate owner and/or officer participated in or directed the wrongdoing, or whether he/she knowingly acquiesced in the unlawful conduct. In short, in the employment context, including the employment discrimination context, where the law, like fair housing law, seeks to guarantee equal treatment to groups of individuals that have historically been discriminated against, liability is fault-based, and not strictly imposed on individuals merely because of their positions.

Courts in a wide range of other contexts, too, consistently require evidence of individual fault before they hold a corporate owner or officer personally liable for the wrongful

acts of the corporation's agent.[15] Of particular note is that courts adhere to this established principle in product liability cases, where public health and safety concerns are often preeminent. For instance, the Fifth Circuit refused to hold the corporation's president personally liable for defects in a cherry picker because the president's involvement in the manufacture of the cherry picker was inadequate to warrant such liability. *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 173-74 (5th Cir. 1985). The court noted that to be held personally liable, an officer "must have some direct, personal participation in the tort, as where the defendant was the 'guiding spirit' behind the wrongful conduct . . . or the 'central figure' in the challenged corporate activity." *Id.*, quoting *Escrude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980).

C. There Is No Need to Abandon Traditional Principles of Corporate Law to Prevent Injustice Because Existing Principles Already Provide Victims With Just Remedies.

Some courts conclude that it is occasionally necessary to adhere to traditional corporate law principles less rigidly in order to prevent injustice. *Mark v. Universal Builders*, 501 F.2d 324, 337 (7th Cir.) *cert. denied by* 419 U.S. 1070 (1974); *Anderson*, 321 U.S. at 356; *Browning-Ferris*, 195 F.3d at 959; *Matchmaker*, 982 F.2d at 1089-94. In such instances, courts have articulated special doctrines or theories to "do right" by the innocent tort victim by seeking a reasoned basis to impose what really is fault-based liability on a corporate officer and owner.

A number of courts have applied the "participation theory," under which a corporate officer may be liable for the corporation's breach of its duty to an injured third party, where the corporation delegated this duty to the corporate officer and where the corporate officer breached this duty *through personal fault*. *Saltiel*, 788 A.2d at 271; *Shipley*, 780 A.2d at 396; *Skelton*, 1996 WL 278343 at 7-8; *Wicks*, 470 A.2d at 90.[16] The court in *Wicks* thus noted that "[l]iability under this theory attaches only where the corporate officer is an actor who participates in the wrongful acts. Therefore, corporate officers may be held liable for misfeasance." 470 A.2d at 90.

Courts have also relied on the "responsible corporate officer doctrine." *E.g., Commissioner, Indiana Dep't. of Envtl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556 (Ind. 2001).[17] The Supreme Court of Indiana recently applied this doctrine to hold a sole shareholder and corporate officer liable for the violation of a state environmental law because of his direct involvement in the violation, and not because of his corporate positions alone. *Id.* at 561. In doing so, the court, relied on two decisions of this Court, *U.S. v. Dotterweich*, 320 U.S. 277 (1943), and *U.S. v. Park*, 421 U.S. 658 (1975), and articulated the doctrine to require that:

> (1) the individual must be in a position of responsibility which allows him to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; *and* (3) *the individual's actions or inactions facilitated the violations.*

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[15] *E.g., Micro Chem., Inc.*, 194 F.3d at 1261 (patent infringement); *Coastal Abstract Serv.*, 173 F.3d 725 (9th Cir. 1999) (false advertising); *PMC*, 78 Cal.App.4th 1368, 93 Cal.Rptr.2d 663 (intellectual property); *Rooney, III v. Commonwealth of Virginia*, 500 S.E.2d 830 (Va. 1998) (criminal embezzlement); *Salac*, 438 So.2d at 1380 (fraud); *Scribner*, 363 A.2d at 168 (construction defects).

[16] *See Johnson v. Harrigan-Peach Land Dev. Co., Inc.*, 489 P.2d 923, 928 (Wash. 1971); *Fletcher Cyc. Corp.*, §1137 (Perm. ed.).

[17] *See U.S. v. Hodges X-Ray, Inc.*, 759 F.2d 557, 560-61 (6th Cir. 1985); *Saltiel*, 788 A.2d at 268; *Rooney*, 500 S.E.2d at 830; *Matter of Dougherty*, 482 N.W.2d at 488-90 (Minn. Ct. App. 1992).

RLG, 755 N.E.2d at 561 (emphasis added), *quoting Matter of Dougherty*, 482 N.W.2d 485, 488-90 (Minn. Ct. App. 1992).

In both *Dotterweich* and *Park*, this Court was willing to hold defendants liable for violations of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-92 (1938) only where it could be shown that they "had a responsible relation to the violation of the statute" and not merely because of their corporate positions. *Park*, 421 U.S. at 673-74; *Dotterweich*, 320 U.S. at 284.

The Indiana court summarized its analysis under the doctrine by indicating that it was not the defendant's

> *status as officer, director, or sole shareholder of RLG that is determinative under this theory. Each of these in itself may be sufficiently removed from the relevant corporate activities that the individual is not a 'responsible corporate officer' despite high corporate office. Rather it is Roseman's (the defendant) direction of and involvement in operating the landfill, his representation to IDEM that he was the responsible party, and his actual role in the corporation's activities that are critical.*

RLG, 755 N.E.2d at 561.

Thus, both the participation theory and the responsible corporate officer doctrine are available to provide substantial protection for the public and to prevent injustice to victims. Under neither doctrine, however, is a corporate officer or owner liable simply because of his position. There must be a degree of wrongful conduct by the corporate owner or officer.

Finally, it is unnecessary to ignore established corporate law principles to protect victims of misconduct by corporate agents in any context, including fair housing. First, the victims may seek remedies from the corporations themselves. *Dillon*, 597 F.2d at 563; *Northside*, 605 F.2d at 1353-54. Under agency principles, a corporation can be sued and held liable for the torts committed by its agents. *Hydrolevel*, 456 U.S. at 556; *Moline v. IRS*, 319 U.S. 436, 440 (1943) (corporate em-

ployee is the agent of the corporation, not the agent of the officers or owners personally). Second, when the corporation has insufficient assets, traditional legal principles provide a remedy against corporate owners and officers by allowing, under appropriate facts, piercing of the corporate veil. *Bestfoods*, 524 U.S. at 62-63; *Anderson*, 321 U.S. at 362; *Browning-Ferris*, 195 F.3d at 959.

In sum, the principle that corporate owners and officers are not personally liable for the unlawful conduct of the corporation's agents solely on the basis of their corporate positions is well-established and consistently upheld by courts—even with regard to other issues of high societal concern. It is unnecessary to disregard this principle to provide a remedy for victims of wrongful conduct, whether such conduct be discriminatory actions or other types of misfeasance, and this Court should declare that the Ninth Circuit erred when it did so.

IV. An Owner or Officer of a Real Estate Brokerage Corporation May Be Personally Liable for the Fair Housing Violations of a Corporate Agent Only If the Owner or Officer Participated in, or Was Otherwise Specifically Responsible for, the Agent's Conduct.

The correct answer to the question before this Court—whether owners and officers are strictly and personally liable for the Fair Housing Act violations by agents of the firm—is aptly illustrated by prior decisions of courts that have started with the basic tenet of corporate law that "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company." *U.S. v. Lorantffy Care Cntr.*, 999 F.Supp. 1045 (N.D. Ohio 1998). A number of courts have refused to hold corporate owners and officers liable under the Fair Housing Act by virtue of their status alone. *Reed v. Michael Realty & Associates, Inc.*, 1994 WL 559225 9, 10 (N.D. Ill. October 7, 1994); *Heights Community*

Congress v. Hilltop Realty, Inc., 629 F. Supp. 1232 (N.D. Ohio 1983), *aff'd in part, rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985), *cert. denied by Hilltop Realty, Inc. v. City of Cleveland Heights*, 475 U.S. 1019 (1986). *Accord, Lorantffy*, 999 F.Supp. at 1045; *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141 (4th Cir. 1975). These courts have opted instead for a thorough analysis of the facts regarding the relationship between the corporate owners or officers and the discriminatory conduct. This is the proper result and that which this Court should adopt.

For example, in *Hilltop*, the U.S. District Court, District of Northern Ohio, declined to hold Vincent Aveni, the president, chief operating officer and co-owner of Hilltop Realty, Inc., vicariously liable for the fair housing violations of Hilltop agents, absent a showing "that he participated in their acts or knew of and ratified their acts and statements." 629 F. Supp. at 1304. The court recognized that the agents had a contractual relationship with the corporation, not with Aveni, so only the corporation was liable for the imputed actions of the agents, noting specifically that Aveni's "status as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees." *Id.* at 1303-04.[18]

In *Lorantffy*, the court found that four individual defendants "associated with" a nursing home owned by a not-for-profit corporation (relationship not specified) were entitled to judgment as a matter of law. 999 F.Supp. at 1040-41. The law, the court said, provides that "no individual may be held vicariously liable for a company pattern or practice simply because she is an officer or manager of the company." *Id.* at 1044. The

[18] The court also conducted a thorough review of the facts and concluded that Aveni had not participated in, knew of or ratified the discriminatory conduct, and refused to hold him liable on that basis as well. *Hilltop*, 629 F.Supp. at 1305.

court held that the individual defendants could not be held liable for the discriminatory conduct, and that only the "company is liable for the acts and statements of its employees." *Id.* at 1045. The court also noted that the other courts in its circuit that had addressed similar violations of the Fair Housing Act had applied the "doctrine of vicarious liability to the company, not the company's individual officers." *Id.*, citing *Hilltop*, 629 F.Supp. at 1303; *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974). *See also Reed v. Michael Realty & Associates, Inc.*, 1994 WL 559225, discussed *infra*, and *Tillman*, 517 F.2d at 1144.

In *Tillman*, the Fourth Circuit held that §§1981 and 1982 of the Civil Rights Acts of 1866 and 1964 "should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation." *Id.* The court was thus unwilling to hold the directors of Wheaton-Haven Recreation Association personally liable for discrimination by the Association by virtue of their positions as directors alone. *Id.* Instead, the court engaged in a comprehensive examination of the directors' actions and intentions and reasoned that "directors become personally liable when they intentionally cause a corporation to infringe the rights secured by §§ 1981 and 1982." *Id.* at 1146.

In sum, since owners and officers of real estate brokerage corporations may not be held liable for the Fair Housing Act violations of corporate agents merely by virtue of their positions, such individuals may be held liable only on the basis of personal fault or culpability for the discriminatory conduct. Such a fault-based standard requires a showing that the owner or officer personally participated in the discriminatory acts, or that, in addition to serving as owner or officer, the individual was actually engaged in conduct that led to the Fair Housing Act violations. In those instances, liability may be imposed in accordance with traditional corporate law principles.

CONCLUSION

For the foregoing reasons, NAR respectfully urges this Court to hold that owners and officers of real estate brokerage corporations are not personally and absolutely liable for an employee's or agent's violation of the Fair Housing Act. This Court should reverse the Ninth Circuit and affirm the District Court's ruling that owners and officers of real estate corporations are not, as a matter of law, liable for the Fair Housing Act violations of the firm's agents. Personal liability of owners and officers must be grounded in their personal participation in the allegedly unlawful conduct, or their personal involvement in, or responsibility for, the real estate activities out of which the alleged violation arose.

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Respectfully submitted,

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